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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT ASSOCIATED DRY GOODS CORPORATION

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BRIEF OF THE AMERICAN RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT ASSOCIATED DRY GOODS CORPORATION

Interest of *Amicus Curiae**

The American Retail Federation (the "Federation") is a federation of state retail associations in all 50 states and the District of Columbia, and 33 national retail associations. Their membership consists of a wide variety of retail stores, ranging in size from small neighborhood retailers to large national chains. Through its members, the Federation represents well over one million retail establishments, which employ over thirteen million workers.

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* The written consents of the parties for participation of the amicus have been obtained and filed with the Clerk of the Court.

The issue presented in this case is of vital importance to retailers. A charge of discrimination by a single employee at a single location may result in a broad investigation of the retailer's employment practices at all of its locations. As part of its investigation, the Equal Employment Opportunity Commission (the "E.E.O.C." or the "Commission") may ask to examine and copy any business record remotely dealing with personnel practices. Under the Commission's present interpretation of Title VII, the investigatory file containing this information is routinely made available to the charging party and to other individuals who file "related" charges against the employer. As a practical matter, the E.E.O.C. has no viable means of preventing further distribution of the information to third parties, for whatever use they may choose. Moreover, this massive penalty of wholesale disclosure is triggered by the simple filing of a charge—whether or not meritorious.

The serious threat which this disclosure poses to the business of every retailer cannot be underestimated. Retailing is a very competitive and sensitive business. The E.E.O.C.'s file may contain such material as the wage and salary structure of the retailer (including salary and bonus figures for middle and upper management, which are often tied to profitability), performance records reflecting sales, profit and loss statements, discipline and promotion records, and other confidential business information. The Commission's practice of releasing such data to charging parties and other interested individuals increases the risk that competitors and special interest groups will learn of the information and use it for their own purposes and to the retailer's detriment. For example, competitors would be able to lure away key personnel, such as buyers, through their knowledge of the wage and salary structure.

The decision of the Court in this case will have a far-reaching impact in the area of protecting the confidential

business information of a retailer. For this reason, the Federation desires to present its views to the Court.

Summary of Argument

The issue before this Court is whether the E.E.O.C. may disclose to individuals not within the government sensitive business information submitted to it in confidence, even though no court proceeding has been commenced. While limited disclosure is permitted when absolutely needed for the E.E.O.C. to fulfill its statutory duties, wholesale disclosure of investigatory and conciliation data to private persons is contrary to law and in excess of the E.E.O.C.'s powers.

Sections 706(b) and 709(e) of Title VII forbid public disclosure of *any* investigative or conciliation materials. The E.E.O.C.'s regulations and disclosure rules interpret the word "public" to exclude charging parties, respondents, their attorneys and witnesses. Although "public" is not defined in Title VII, the E.E.O.C.'s disclosure practices violate Sections 706(b) and 709(e). The wording of the statute, its legislative history, and its statutory purpose not only fail to support the E.E.O.C.'s position, but also indicate that private persons—including charging parties, respondents and witnesses—are encompassed within the word "public". When Sections 706(b) and 709(e) are read as part of the framework of numerous Congressional enactments and judicial decisions which protect investigative data and confidential business information from disclosure to parties and non-parties, the illegality of the E.E.O.C.'s disclosure rules becomes apparent. Moreover, the rules hinder the operation of Title VII by undermining the statute's purpose of voluntary compliance and conciliation. Under the current practice of the E.E.O.C., charging par-

ties are encouraged to litigate their cases in private suits rather than await E.E.O.C. attempts at conciliation, since the charging parties know that they can have wholesale access to confidential file information long before the E.E.O.C. officially acts. The attitude of the E.E.O.C. discourages employer cooperation, since entrusting business secrets to the agency is akin to storing water in a sieve.

The disclosure rules go far beyond what is necessary for the E.E.O.C. to perform its duties. The purpose of the provisions should be to allow only that disclosure which is absolutely necessary for a thorough investigation. As they presently stand, the rules transform the agency into a private discovery tool, and only serve to spark and fuel private litigation.

Finally, assuming *arguendo* that such wholesale disclosure of confidential business information to private parties is not foreclosed by Title VII, the Trade Secrets Act, 18 U.S.C. §1905 (1976), forbids disclosure of such information to charging parties. The E.E.O.C.'s disclosure rules are also substantive rules within the meaning of the Administrative Procedure Act, 5 U.S.C. §553 (1976), and as such are beyond the Commission's powers under Title VII.

ARGUMENT

I.

Title VII Prohibits Disclosure of Information to Private Persons Involved in the Investigation Unless Such Disclosure Is Absolutely Necessary for the E.E.O.C.'s Functions.

A. *The Language and Legislative History of Sections 706(b) and 709(e) of Title VII Reflect Congressional Concerns Over Governmental Disclosure of Confidential Business Information and Investigatory Files.*

As part of the enforcement scheme of Title VII, Congress enacted provisions to insure the confidentiality of information which employers are required to submit to the E.E.O.C. after a charge of employment discrimination has been filed. Section 709(e), 42 U.S.C. §2000e-8(e) (1976) ("Section 709(e)") protects information that the E.E.O.C. obtains during the course of its investigation of a charge by making it unlawful for any employee of the E.E.O.C. *"to make public in any manner whatever"* such information prior to the institution of an administrative or judicial proceeding[1] under Title VII (emphasis added). Section 706(b), 42 U.S.C. §2000e-5(b) (1976) ("Section 706(b)") provides that "nothing said or done during and as a part of" conciliation of charges between the E.E.O.C.

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[1] While "proceeding" is not defined in Title VII, for the purpose of Section 709(e) it encompasses only formal adjudicatory hearings in which evidence developed through the investigation is formally presented to a fact-finder, and not informal agency actions such as negotiations or conciliations. *Cf. New York Gaslight Club, Inc.* v. *Carey*, 22 FEP Cases 1642 (U.S. 1980). For instance, a Commission determination of reasonable cause does not constitute a "proceeding" for the purpose of disclosing investigative data to the public. *Sears, Roebuck and Co.* v. *E.E.O.C.*, 581 F.2d 941, 949 n. 11 (D.C. Cir. 1978).

and the parties "may be made public by the Commission . . . without the written consent of the persons concerned." Both of these provisions carry criminal penalties for violations.

While the word "public" is not defined in Title VII, the E.E.O.C. has interpreted "public" in these provisions to exclude private persons interested in the processing of the charge, including charging parties, witnesses and respondents. 29 C.F.R. §§1601.22, 1610.17(d). "Special disclosure rules" followed by the E.E.O.C. for these persons allow charging parties to have full access to its investigative files 180 days after a charge has been filed with it. E.E.O.C. Compliance Manual, §83.3(a), 83.5(a) (Pet. App. 34a-35a, 36a). The charging party and his attorney are also given access to investigatory files compiled as a result of "related" charges filed by other individuals. E.E.O.C. Compliance Manual, §83.7(c) (Pet. App. 43a). The respondent and his attorney, however, are only given access to the investigatory file compiled on the charge in question, and even then only after the charging party has filed suit. E.E.O.C. Compliance Manual §83.5(e) (Pet. App. 37a).

This strained interpretation of "public" is contrary to its common and intended usage.[2] "Public" as used in these sections encompasses all members of the general public, including private persons involved in the investigation of the charge. A party is as much a member of the public as one who has no interest in the proceedings. In fact, "public" is generally used in disclosure statutes to embrace all who are outside the government, including private parties.

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[2] *Webster's Seventh New Collegiate Dictionary*, p. 690, defines "public" as "of, relating to, or affecting *all* the people or the whole area of a nation or state" and "accessible to or shared by *all* members of the community" (emphasis supplied).

See, e.g. Consumer Product Safety Commission v. *GTE Sylvania*, 100 S. Ct. 2051, 2056 (1980); *N.L.R.B.* v. *Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978); *N.L.R.B.* v. *Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

One of the issues in *Robbins Tire, supra*, was whether a party had a greater right of access to investigative file information under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b), than any other member of the public. In that case, the Court upheld a policy of non-disclosure of all information in open investigatory files, citing the potential of "interference" in the enforcement process. *Id.* at 239. The Court concluded that a party was as much a part of the "public" as those without a legal interest in the investigation. While a party's "rights are [not] in any way diminished by its being a private litigant, . . . neither are they enhanced by [a] particular, litigation-generated need for these materials." *Id.* at 242, n. 23. *See also* Brief for Petitioner at page 19, n. 11.

Congress emphasized its concern for confidentiality in Section 709(e). By barring disclosure of investigatory information *"in any manner whatever"*, Congress intended to make clear to the E.E.O.C. that any disclosure of investigative information to anyone outside the government was to be limited to the absolute minimum needed by the Commission to carry out its duties, and in a manner so as not to compromise the confidentiality of such information. These emphatic words are not to be regarded as "mere surplusage". *New York Gaslight Club, Inc.* v. *Carey*, 22 FEP Cases 1642, 1645 (U.S. 1980). "Absent a clearly expressed legislative intention to the contrary," the straightforward reading of the word "public" in Sections 706(b) and 709(e) conclusively includes parties and witnesses. *Consumer Product Safety Commission* v. *GTE Sylvania, supra*, 100 S. Ct. at 2056. *See also Mohasco Corp.*

v. *Silver*, 23 FEP Cases 1, 4-5 (U.S. 1980) (plain meaning of word "filed" in Section 706(e) of Title VII controls absent Congressional intention to the contrary).[3]

Although the legislative history of Sections 706(b) and 709(e) is "sparse", it supports inclusion of parties and witnesses within the definition of "public". *Sears, Roebuck and Co.* v. *E.E.O.C.*, 581 F.2d 941, 947 (D.C. Cir. 1978). During the debate on Title VII in the Senate in 1964, Senator Humphrey stressed that disclosure of information from investigatory files under Section 709(e) was to be

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[3] Contrary to the E.E.O.C.'s assertion (Brief for Petitioner at 19-20), the requirement of Section 706(b) that a notice of charge be served upon a respondent does not imply that persons directly involved in the investigation are not members of the "public", even though Section 706(b) requires that charges not be made "public". The E.E.O.C. is required to serve only a notice of the charge, not a copy of the charge itself. Furthermore, service of the notice of charge upon the respondent fulfills due process requirements of notice and "constitutes an express exception to the non-disclosure provisions." *H. Kessler and Co.* v. *E.E.O.C.*, 468 F. 2d 25, 27 (5th Cir. 1972), *rev'd en banc* 472 F. 2d 1147, *cert. den.* 412 U.S. 939 (1973) (hereinafter referred to as "*Kessler* (panel decision)").

The Commission also argues that Section 706(b), which requires "the written consent of the persons concerned" prior to disclosure of conciliation information, indicates that parties participating in conciliation are not members of the public. (Brief for Petitioner at 20.) This contention also has no merit. That provision merely states that the party who actually supplied information during conciliation or engaged in discussion of settlement proposals cannot have such information or proposals used against him without his consent. The intent, obviously, is to encourage frank and meaningful discussions leading to a voluntary resolution of the alleged illegal practice. *Kessler* (panel decision), *supra*, 468 F.2d at 127. The contention that confidential information must be disclosed to a party who did not supply it so that the party's unnecessary consent to its further disclosure can be obtained is a fallacious reading of the statute.

[4] Since the meaning and intent behind the use of "public" in both Sections 706(b) and 709(e) are the same, there is no reason to construe the language in each provision differently. *Sears, Roebuck and Co.* v. *E.E.O.C., supra*, 581 F.2d at 948.

permitted *only* to the extent absolutely necessary for the E.E.O.C. to carry out its functions.

> [T]his is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

110 Cong. Rec. 12723 (1964). In discussing Section 706(b), Senator Dirksen stated that "maximum results" would be achieved by insuring that the "investigation and conciliation are carried on in privacy," with disclosure of any information occurring only "when a court suit is filed." 110 Cong. Rec. 8193 (1964).

There is no support in either of these statements for the E.E.O.C.'s disclosure rules which provide for the wholesale disclosure of confidential information in investigatory files (or *any* information in those files for that matter) to a charging party or his attorney. Rather, the entire thrust of these statements is to limit disclosure of investigative and conciliation information to the minimum amount necessary for the Commission to perform its duties—not to permit the E.E.O.C. to fuel the lawsuit of a private litigant. Thus, there is no support whatsoever in the legislative history for the E.E.O.C.'s disclosure rules.[5]

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[5] The Commission contends that the 1972 amendments to Title VII indicated Congressional approval of the Commission's interpretation of the non-disclosure provisions. Brief for Petitioner at

While the legislative history on Sections 706(b) and 709(e) is minimal, they fit within a pattern of legislation which Congress has enacted to protect businesses from public disclosure of confidential information which they are required to submit to the Government. *See, e.g.*, 18 U.S.C. §1905 (1976) (the "Trade Secrets Act" which protects information provided to the Government relating to "trade secrets" or "confidential" business data); 5 U.S.C. §552 (b)(4) (1976) (the "trade secrets" exemption to the FOIA); 15 U.S.C. §2055 (a)(2) (1976) (protection of trade secrets and confidential business information submitted to the Government under the Consumer Product Safety Act). *See also Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 n. 42 (1979). Moreover, "the federal courts have long recognized a qualified privilege for trade secrets and other confidential information." *Federal Open Market Committee of the Federal Reserve System* v. *Merrill*, 443 U.S. 340, 356 (1979). *See also Consumer Product Safety Commission* v. *GTE Sylvania, supra*, 100 S. Ct. at 1057-58; *E.I. duPont de Nemours Powder Co.* v. *Mosland*, 244 U.S. 100, 103 (1917).

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page 26 n. 15. The Senate bill would have amended Section 709(e) to prohibit disclosure of "any record or paper" required to be kept, except to Congress or government agencies or in a court proceeding. *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 67 (1971). This amendment was deleted without comment by the conference committee. It is a canon of statutory construction that "[a]ctions on proposed amendments are not significant aids to interpretation of an act that was passed years before." 2A C. Sands, *Sutherland on Statutes and Statutory Construction* §48.18 at n. 4.1 (4th ed. 1973 and 1979 Cum. Supp.). Moreover, "legislative inaction has . . . been called a 'weak reed upon which to lean' and a 'poor beacon' to follow in construing a statute." *Id.* at §49.10. It is a particularly poor beacon in this case where the proposed amendment was dropped without explanation or debate. *Sears Roebuck and Co.* v. *E.E.O.C., supra*, 581 F.2d at 947-48 n. 9. *See also Mohasco Corp.* v. *Silver, supra*, 23 FEP Cases at 7-8 on the unreliability of using statements of a subsequent Congress to infer the intent of an earlier one.

The policy reflected in these Congressional enactments is that individuals and businesses have a right to conduct their affairs in private. In such Acts, Congress acknowledged that unnecessary public disclosure of confidential business information could irreparably harm the company, whose only error may have been to cooperate with the Government. By restricting governmental disclosure of confidential business information in various statutes, Congress sought to establish "as a matter of policy, some balancing and accommodation" between the public's right to know and the individual's right to privacy. *Chrysler Corp.* v. *Brown, supra* at 293.

Within the last several years, this Court has also decided several cases involving the issue of government disclosure of confidential information under these statutes. *See, e.g., Consumer Product Safety Commission* v. *GTE Sylvania, supra; Federal Open Market Committee of the Federal Reserve System* v. *Merrill, supra; Chrysler Corp.* v. *Brown, supra; N.L.R.B.* v. *Robbins Tire and Rubber Co., supra; N.L.R.B.* v. *Sears Roebuck and Co., supra.* Each time, the Court recognized the importance of protecting confidential information from disclosure to persons outside the Government. For instance, in *Chrysler Corp.* v. *Brown*, this Court examined the disclosure rules of the Office of Federal Contract Compliance Programs ("OFCCP") and held that those regulations could not authorize disclosure of confidential business information by the Government in violation of the Trade Secrets Act.[6]

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[6] The data submitted by the employer in that case to the Defense Logistics Agency was strikingly similar to information that the E.E.O.C. has in its investigation files: information on employer compliance with equal employment opportunity laws and various manning tables. Since OFCCP is not a Title VII agency, Sections 706(b) and 709(e) were inapplicable. After deciding that the Trade Secrets Act applied, the Court remanded for a determination of whether the information involved was "confidential" within the meaning of the Act.

Sections 706(b) and 709(c) of Title VII must be examined with these Congressional and judicial concerns in mind; they should not be interpreted in a vacuum. When the words of these provisions and their legislative history are read in conjunction with these recurrent Congressional and judicial concerns, it is apparent that Congress has acted to prevent governmental disclosure of confidential business information to persons outside the government.

"Public" includes private persons directly interested in the investigation. The Commission's special disclosure rules for private persons involved in the processing of the charge are contrary to Title VII and should be invalidated.[7]

B. *Disclosure of Information From Investigatory Files Undermines the Legislative Purpose Behind Title VII.*

When Congress enacted Title VII to eliminate discrimination in employment, "cooperation and voluntary compli-

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[7] The history of the E.E.O.C.'s disclosure regulations indicate that it substantially revised its own interpretation of the non-disclosure provisions. In the first version of its disclosure practices in its rules of procedure, the Commission allowed "such earlier disclosures to the charging party, the respondent [and] witnesses . . . *as may be appropriate or necessary to the carrying out of the Commission's functions under the title* . . ." 30 Fed. Reg. 8407 (1965) (codified in former 29 C.F.R. §1601.20) (emphasis added). In 1977, however, the Commission amended this provision to provide for "such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses *where disclosure is deemed necessary for securing appropriate relief.*" 42 Fed. Reg. 42022 (1977) (codified in 29 C.F.R. §1601.22). The subtle shift in emphasis from disclosure necessary for the Commission to perform its statutory functions to disclosure to secure "necessary relief"—including private lawsuits—should be noted. This undercuts the Commission's claim of consistency in interpreting its statute. *See also* 40 Fed. Reg. 8171 (1975) (codified as 29 C.F.R. §1610.17(d) [Commission regulation providing for special disclosure rules not promulgated until *1975.*]

Regardless, it is well established that the E.E.O.C.'s interpretation of Title VII "cannot supersede the language chosen by Congress." *Mohasco Corp.* v. *Silver, supra*, 23 FEP Cases at 8. *See also General Electric Corp.* v. *Gilbert*, 429 U.S. 125, 140-42 (1974).

ance were selected as the preferred means for achieving this goal." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The structure of the Act itself bears witness to this. A charging party must first file his charge with the E.E.O.C. or a state or local authority, if it exists. Sections 706(b) and (c), 42 U.S.C. §2000e-5(b) and (c) (1976). The E.E.O.C. is given at least 180 days after the filing of the charge to investigate the charge, determine whether reasonable cause exists to believe the charge true, and engage in conciliation with the respondent in an attempt to achieve voluntary compliance. Section 706(b). If conciliation fails, the E.E.O.C. may bring suit in Federal court to achieve compliance. Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (1976).

Even though a charging party may pursue a private lawsuit under Title VII if the E.E.O.C. has not filed a civil action within 180 days of the filing of the charge, *ibid.*, the primary means of achieving compliance with Title VII is through the efforts of the E.E.O.C. to obtain voluntary compliance. Senator Dirksen, in discussing the non-disclosure provisions in Title VII, stressed the need for voluntary compliance and conciliation: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried out in privacy." 110 Cong. Rec. 8193 (1964). Wholesale disclosure of investigative files runs counter to this statutory purpose.

Employer cooperation with E.E.O.C. investigations is discouraged since employers know that confidential business information will be publicly disclosed to charging parties and their attorneys long before any suit is filed.[8]

[8] The history of this case is a prime example. The information which the E.E.O.C. asked the Respondent to submit was highly sensitive. App. 40-42. Data on payroll and promotions would be invaluable to a competitor or a union in analyzing Respondent's pay structure, manning, and costs. Such information, as well as

An employer also finds it difficult to retain a conciliatory attitude toward the E.E.O.C. if the E.E.O.C. is encouraging private lawsuits by wholesale disclosure of confidential information to the charging party. Congress obviously did not intend the plain meaning of the non-disclosure provisions of Title VII to be circumvented by the Commission in such a manner as to undercut the keystone statutory purpose of conciliation and voluntary compliance. *See Burlington Northern, Inc.* v. *E.E.O.C.*, 582 F.2d 1097, 1100 (7th Cir. 1978); *Sears, Roebuck and Co.* v. *E.E.O.C.*, *supra*, 581 F.2d at 946; *Kessler* (panel decision), *supra*, 468 F.2d at 27.

By opening investigatory files to charging parties, the E.E.O.C. emphasizes an adversarial stance and encourages private litigation. This is entirely contrary to the E.E.O.C.'s duties as a neutral, objective investigator and conciliator. "[T]he E.E.O.C. does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment litigation and settling disputes, if possible, in an informal non-coercive fashion." *Occidental Life Insurance Co.* v.

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information on discipline, would seriously infringe upon the privacy rights of employees if it were publicly disclosed. Finally, disclosure of arrest records in the Security Department would not only publicly embarrass third parties, but also subject the Respondent to numerous lawsuits for libel and/or false arrest. Naturally, Respondent chose to seek protection for its confidential business information in the courts rather than to resign itself to the ramifications of public disclosure of information under the E.E.O.C.'s current rules.

Moreover, this dilemma is faced by all retailers under the E.E.O.C.'s disclosure rules. It is not surprising that three of the four Court of Appeals decisions regarding the disclosure rules have involved retailers. *Associated Dry Goods Corp.* v. *E.E.O.C.*, 607 F.2d 1075 (4th Cir. 1979); *Sears, Roebuck and Co.* v. *E.E.O.C.*, *supra; H. Kessler & Co.* v. *E.E.O.C.*, 472 F.2d 1147 (5th Cir.) (en banc), *cert. den.* 412 U.S. 939 (1973) (hereinafter referred to as "*Kessler* (en banc decision)").

E.E.O.C., 432 U.S. 355, 368 (1977). *See also Burlington Northern, Inc.* v. *E.E.O.C., supra,* 581 F.2d at 946. The disclosure rules, however, discourage conciliation and compliance, and constitute an abdication by the E.E.O.C. of its statutory duties. Contrary to the E.E.O.C.'s view, the nondisclosure provisions clearly demonstrate that the E.E.O.C. was not intended to function as a "private discovery tool". *Cf. N.L.R.B.* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 242.

While a charging party has a right to sue privately if he chooses not to await the results of the Commission's efforts,[9] Title VII does not provide him with open access to confidential information in the Commission's files. If the private plaintiff pursues his independent remedy under Title VII, he is governed by the discovery rules of the Federal Rules of Civil Procedure, as is any other litigant. The private litigant may indeed request in pre-trial discovery confidential data which may be relevant to his case. But, the employer will be protected since the District Court may limit access to and disclosure of the information, with the power to enforce sanctions for breaches of confidentiality. *See, e.g.,* Federal Rule of Civil Procedure 26(e)(7). Requiring private parties to commence suit before obtaining any confidential information or investigative file data is a fair and equitable balance between enforcement of Title

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[9] Although suit by a private party is an important part of enforcing Title VII, it is separate and distinct from the functions of the E.E.O.C. The charging party has the option of letting the E.E.O.C. go to court to enforce his rights if "reasonable cause" is found, since "reasonable cause" is defined as having "sufficient merit to warrant litigation". E.E.O.C. Compliance Manual, §40.1. The existence of this private right of action, moreover, does not supplant the primary statutory purposes of voluntary compliance and conciliation. *See, e.g., Occidental Life Insurance* v. *E.E.O.C., supra* at 366.

VII rights and protection of the employer's interest in confidentiality.[10]

Thus, the E.E.O.C.'s disclosure rules run afoul of the legislative purpose behind Title VII. These rules also undercut the Commission's statutory function. They should be held invalid.

C. *Under Its Present Rules, the E.E.O.C. Is Unable and Unwilling to Prevent the Transmission of Confidential Information to Third Parties.*

As this Court has said in the context of the F.O.I.A., when employers submit confidential business information to an agency, "the submitters' interest in confidentiality [is protected] only to the extent that this interest is endorsed by the agency collecting the information." *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 293. This point underscores the fallacy in the E.E.O.C.'s contention that the non-disclosure agreement which a charging party or his attorney signs to obtain access to an investigatory file is an effective deterrent to the disclosure of confidential information. Not only is the agreement a poor substitute for non-disclosure, but the E.E.O.C.'s capricious approach

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[10] Contrary to the Commission's assertion, private parties will not be crippled in enforcing their rights under Title VII if they are not permitted wholesale access to investigatory files. The concerns for the private plaintiff that the Fifth Circuit had in *Kessler* (en banc decision), *supra,* 472 F.2d at 1152-53, have been largely addressed by the 1972 amendments to Title VII. Federal courts are empowered to appoint an attorney for a Title VII plaintiff. Allowing the private plaintiff attorney's fees for actions and proceedings militates against delay on the part of the employer in either administrative proceedings or pre-trial discovery. *New York Gaslight Club, Inc.* v. *Carey, supra.* Finally, since the time a plaintiff has to bring suit was expanded from 30 days to 90 days, plaintiffs are provided adequate time to draft even the barest bones of a complaint. *See, Sears, Roebuck and Co.* v. *E.E.O.C., supra,* 581 F.2d at 947-48.

to the safeguarding of confidential information provides employers with absolutely no protection.

A glance at the record in this case indicates the sensitive and confidential business information which the E.E.O.C. seeks—information which it will freely turn over to a charging party without regard to protecting the employer's interest in its confidentiality. The agency subpoena (App. 40-42) sought such data as payroll records, promotion records, other confidential personnel information, and detailed records of arrests made by store security personnel. Public disclosure of any of this information would cause immediate harm to the employer's business. Employee morale would certainly suffer if employees realized that information regarding salaries, promotions, and disciplinary action taken against them would be made public.[11] Competitors and pressure groups could use payroll, promotion, staffing, and other personnel information in a manner detrimental to the employer's business. Selective portions of confidential information could be publicized in a way intended to put the employer unjustifiedly in a bad light or to exert undue influence on him. Loss of customers and sales could result. Disclosure of information such as records of arrests by store security personnel would not only embarrass third parties but could also subject the employer to civil suits.

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[11] In a survey of public attitudes undertaken by Louis Harris and Associates and Professor Alan F. Westin of Columbia University, it was found that 58% of those surveyed expressed concern that the federal government would misuse data that it collects on individuals. 41% of those polled felt that "government welfare agencies" should be doing more to protect the confidentiality of personal information which they collect. 32% stated that "government welfare agencies" ask for too much information on individuals. *The Dimensions of Privacy* (privately printed by the Sentry Insurance Company, Stevens Point, Wis., 1980), at 26-29, 66, 71.

Although the E.E.O.C. asserts that it is not aware of a single instance in which a charging party has transmitted information in violation of the non-disclosure agreement (Brief for Petitioner, page 37 at n. 24), it introduces no proof to support such a bold statement. Furthermore, charging parties often support organizations which have an adversary attitude toward the employer. To imply, as the E.E.O.C. does, that a charging party has *never* transmitted confidential information supplied by an employer to a third party ignores reality. Because of the charging party's adversarial position and frequent ties to outside interests, "there are many times when the charging party may be the very person to whom a company most fears pre-suit release of information." *Kessler* (panel decision), *supra,* 468 F.2d at 27.[12] In fact, the negligent disclosure by the E.E.O.C. of information regarding all the charges in this case to an attorney who represented some of the charging parties and various unions who negotiate contracts with the Respondent provided the Respondent with serious and legitimate cause for alarm. App. 29-30, 69-70.

The non-disclosure agreement which individuals sign when they are given access to open investigatory files offers no protection to employers at all. While, *arguendo*, it may provide an employer with a cause of action as a third party beneficiary,[13] injunctive relief after disclosure is a wholly inadequate remedy. *Sears, Roebuck & Co.* v. *E.E.O.C., supra,* 581 F.2d at 946-47. Moreover, while damages from disclosure are tangible and real, they are difficult to mea-

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[12] *See, e.g. Kessler* (panel decision), *supra,* 486 F.2d at 27, where the panel of the Court of Appeals stated that the employer's fears of transmission of confidential information by the charging party were "well-founded as we view the record."

[13] Since the E.E.O.C. has admitted that it has never sought enforcement of a non-disclosure agreement, its enforceability is unproven and questionable. *Sears, Roebuck and Co.* v. *E.E.O.C., supra,* 581 F.2d at 146-47.

sure, transcending monetary compensation. The employer cannot easily be recompensed for loss of his competitive position, damage to his business, and loss of customers. Similarly, the lack of meaningful penalties for disclosure provides no incentive to avoid disclosure. *Cf. Snepp* v. *U.S.*, 100 S. Ct. 763, 768 (1980). Non-disclosure of investigatory file information to private parties or other members of the public is a "prophylactic rule" which is infinitely preferable to ineffectual and hypothetical post-disclosure sanctions. *N.L.R.B.* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 239-40.

Finally, the current attitude of the E.E.O.C. toward disclosure of investigative data and confidential business information underlines its unwillingness to recognize the problem or act to protect the employer's interest. Ingrained agency hostility and the lack of an effective measure to prevent transmission of confidential information are fatal flaws in the E.E.O.C.'s disclosure rules.

D. *The E.E.O.C.'s Functions Will Not Be Handicapped by Compliance With the Statutory Mandate of Title VII.*

The E.E.O.C. argues at length that unfettered disclosure of investigatory and conciliation information to persons interested in the investigation is absolutely vital to its operation. Brief for Petitioner at pages 28-44. While an argument of administrative efficiency is not enough to overcome a statutory prohibition,[14] the E.E.O.C. seeks to blur the distinction between disclosure necessary for it to fulfill its statutory duties and disclosure which it feels is helpful to a private party's lawsuit. *See* note 7, *supra.*

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[14] As this Court has stated, "[T]he existence of a prior administrative practice, even a well-explained one, [does not] relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority." *S.E.C.* v. *Sloan,* 436 U.S. 103, 117 (1978). *See also Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 304, 308.

It is interesting to note that other Federal agencies do not find it necessary to provide private parties with broad access to open investigatory or conciliation files in order to carry out their statutory duties of investigation and prevention. The National Labor Relations Board, for instance, has taken the position that disclosure of any open investigatory files would hinder its statutory duties to investigate and remedy unfair labor practices. 29 C.F.R. §102.117(d). This Court upheld the N.L.R.B.'s position in *N.L.R.B.* v. *Robbins Tire & Rubber Co., supra.*[15]

Both the Occupational Safety and Health Administration (O.S.H.A.) and the Wage and Hour Division of the Department of Labor (W.H.D.) do not allow interested persons access to open investigatory files. 29 C.F.R. §70.27. Both agencies also restrict access to closed files if they contain confidential business information. 29 C.F.R. §§70.21, 70.24. This is especially significant in the case of the W.H.D., since an employee has a private right of action under the Fair Labor Standards Act. 29 U.S.C. §216(b) (1976). None of these agencies claim that they are handicapped in the performance of their duties by the lack of wholesale disclosure of investigative files to parties or other individuals.

Rather, it is only the E.E.O.C. which makes this claim. The legislative history of Section 709(e) indicates that the E.E.O.C. is not precluded from making minimal disclosures of information to interested persons when abso-

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[15] While it may be argued that private parties do not have a right of action under the National Labor Relations Act, certain unfair labor practices may also provide a party with a private right of action under Section 301 of the Taft-Hartley Act, 29 U.S.C. §185 (1976). For instance, an employee may sue to remedy a breach of the duty of fair representation by an employer and a union even though such a breach is also a violation of the National Labor Relations Act. *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

lutely necessary to investigate a charge. As the Fourth Circuit pointed out below (607 F.2d at 1077), the Commission could effectively function by disclosing the least amount of information necessary, and by camouflaging sources and unnecessary details as much as necessary. Clearly, it is possible to obtain the statements of parties and witnesses without discussing or revealing unnecessary information.

Moreover, the E.E.O.C.'s effectiveness would be enhanced since employers would not object to supplying confidential information if there were meaningful guarantees of non-disclosure. Employers would be more willing to engage in frank and meaningful discussions in fact-finding conferences and conciliation, since they would be assured that their business information would not be compromised. Rather than increasing the Commission's caseload, there would be more of a tendency to settle matters before positions formalized. This would be quite unlike the present situation, where employers feel compelled to obtain court protection for confidential information provided to the E.E.O.C. *Sears, Roebuck & Co.* v. *E.E.O.C., supra,* 581 F.2d at 947.

The language, history and purpose of Sections 706(b) and 709(e) require that confidential business information which an employer submits to the E.E.O.C. be kept confidential. Investigatory and conciliation files are not to be disclosed to members of the public—including parties and witnesses. The purposes of Title VII would be furthered by non-disclosure. The E.E.O.C.'s disclosure rules not only override the clear mandate of the statute, but are also wholly superfluous to the duties and functions of the E.E.O.C. The disclosure rules violate Title VII and are invalid.

II.

The E.E.O.C.'s Disclosure Rules Violate Other Statutory Provisions.

A. *Disclosure of Confidential Business Information to Private Persons Involved in the Investigation Violates the Trade Secrets Act.*

Although the majority decision below did not reach the issue of the applicability of the Trade Secrets Act, 18 U.S.C. §1905 (1976), the Respondent did allege in its complaint and appeal that E.E.O.C. disclosure of confidential information in investigatory and conciliation files violates the Trade Secrets Act as well as Title VII and is actionable under the Administrative Procedure Act. App. 10-11. *See also Associated Dry Goods Corp.* v. *E.E.O.C.*, 607 F.2d 1075, 1079 n. 3 (4th Cir. 1979). Under this Court's decision in *Chrysler Corp.* v. *Brown, supra*, it is clear that the E.E.O.C.'s disclosure rules violate the Trade Secrets Act as well.

In *Chrysler Corp.* v. *Brown,* one of the issues was whether the disclosure rules of OFCCP permitting disclosure of various work force data contravened the Trade Secrets Act. The question turned on whether the regulations permitting disclosure of such sensitive information were "authorized by law" as an exception to the non-disclosure provision of Section 1905. Since the disclosure rules were enacted pursuant to an Executive Order, the Court did not find the legislative authorization necessary to issue such rules.

This Court's decision in *Chrysler Corp.* v. *Brown,* mandates that the E.E.O.C.'s disclosure rules be held in violation of Section 1905. As Point I, *supra,* sets out at length, Title VII prohibits *any* public disclosure, includ-

ing disclosure and resolution of the charge. Assuming *arguendo* that charging parties or their attorneys are not considered members of the "public" for purposes of the non-disclosure provisions of Title VII, the statute, nevertheless, does not affirmatively authorize disclosure of confidential business information to charging parties by the Commission. Indeed, the non-disclosure provisions strongly suggest the reverse.

As discussed in Point I. C, *supra*, the information requested by the Commission is often sensitive and extremely confidential business information, reflecting general payroll data, compensation of key personnel, costs, sales, profitability and other economic and personnel matters. Such information clearly concerns "operations" and relates to "confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation or association" as is required by Section 1905.[16] Moreover, the Commission itself has put its officers and employees on notice of the applicability of Section 1905 to its work. 29 C.F.R. §1600.735-205(f)(b).

Thus, apart from the non-disclosure provisions of Title VII, the Trade Secrets Act prohibits the Commission from releasing confidential business information in its files to any private persons involved in the charge. The disclosure rules permitting such disclosure should be set aside as being contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) and (C) (1976).

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[16] The existence of non-disclosure provisions in Title VII does not preclude the application of Section 1905 to the Commission. As demonstrated in Title VII itself, Congress often provides distinct but parallel statutory remedies to prevent or redress a wrong. *See, e.g. Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

B. *The E.E.O.C.'s Disclosure Rules Are Substantive Rules, and as Such, Exceed Its Statutory Authority.*

In *Chrysler Corp.* v. *Brown, supra,* in examining the regulations of OFCCP permitting disclosure of various equal employment data (41 C.F.R. §§60-40.2 to 60-40.4), this Court held that such disclosure regulations were "substantive" agency regulations within the meaning of the Administrative Procedure Act, 5 U.S.C. §553 (1976). *Id.*, 441 U.S. at 301-03. As such, they were subject to the notice and comment rulemaking procedure of the Administrative Procedure Act. *Id.* at 312-16.

The regulations at issue in this case are strikingly similar to the regulations in *Chrysler Corp.* They authorize disclosure of confidential business information which reflects the equal employment practices of the employer. Both sets of regulations permit disclosure of this information to individuals outside the Government. While the regulations in *Chrysler Corp.* permitted disclosure to both interested private persons and members of the general public, the information in question here is much more sensitive and detailed.[17] Following that Court's reasoning, the E.E.O.C.'s disclosure regulations "certainly affect individual rights and obligations", by governing "the public's right to information" in investigative files and "the con-

[17] This is not to say that disclosure under the regulations in *Chrysler Corp.* constitutes "public" disclosure, while disclosure under the Commission's regulations is not. Disclosure to any non-governmental entity is "public" disclosure. Nor does the type of information disclosed determine who is a member of the "public". The fact that a charging party may view an investigatory file compiled on *his* charge does not transform his standing as a member of the "public". "[C]onceptually, . . . the definition of public ought to turn on who is to receive the information rather than how much may appropriately be given the recipient." *Burlington Northern, Inc.* v. *E.E.O.C., supra,* 582 F.2d at 1100-01. *See also N.L.R.B.* v. *Robbins Tire and Rubber Co, supra,* 437 U.S. at 242 n. 23 (1978).

fidentiality rights of those who submit information" to the E.E.O.C. *Id.*, 441 U.S. at 303.

The E.E.O.C. promulgated its substantive agency disclosure rules without adhering to the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §553. The provision providing for "special disclosure rules" for interested individuals was promulgated without explanation, public hearings or opportunity for public comment. 40 Fed. Reg. 8171 (1975). *See also* note 7, *supra*. Accordingly, the disclosure rules were not promulgated according to law. 42 U.S.C. §2000e-12(a); *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 312-16; *Chamber of Commerce of the U.S.A.* v. *O.S.H.A.*, No. 78-2221 (D.C. Cir., July 10, 1980).

A more serious problem with the regulations is contained in Title VII itself. Section 713(a) of Title VII gives the E.E.O.C. authority to issue *only* procedural regulations. 42 U.S.C. §2000e-12(a) (1976). It is well established that the Commission does not have authority to promulgate substantive rules and regulations. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975); *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141 (1976). Since the disclosure regulations of the E.E.O.C., however, are substantive, *Chrysler Corp.* v. *Brown, supra,* 441 U.S. at 303, it is evident that the Commission exceeded its authority in promulgating such rules. The rules at issue in this case, then, are illegal and may not be applied by the E.E.O.C.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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